

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BILLY TYLER,

Plaintiff,

v.

SOCIAL SECURITY ADMINISTRATION,

Defendant.

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4:09CV3026

MEMORANDUM AND ORDER

This matter is before the court on defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). Filing No. [21](#). Plaintiff seeks judicial review of the denial of a claim for benefits under Title XVI of the Social Security Act. Defendant argues that the plaintiff has failed to exhaust his administrative remedies, and therefore, there is not a final decision of the Commissioner which precludes review under 42 U.S.C. § 405(g). See Patrick Herbst declaration, Chief of Court Case Preparation and Review Branch 4 of the Office of Disability Adjudication and Review, for the Social Security Administration, Filing No. [23](#).

Plaintiff initially applied for benefits in April 2007, the application was denied, and plaintiff did not appeal the denial. See Herbst Declaration, Filing No. [23](#). Plaintiff filed a new application in October 2008, the application was granted, and plaintiff received benefits. Plaintiff then filed a request for reconsideration on February 2, 2009, asking the Commissioner to give him benefits from the earlier 2007 application time period. On February 5, 2009, the plaintiff filed suit in federal court. On the next day, February 6, 2009, defendant notified plaintiff that the 2007 application would not be reopened, since he did not appeal the denial nor did he show good cause for the untimely appeal. See Herbst Declaration, Filing No. [23](#). The Commissioner argues that plaintiff is required to follow the

four-step administrative review process to obtain a final decision that is subject to judicial review. See 20 C.F.R. § 416.1400(a) (2010); [Califano v. Sanders, 430 U.S. 99, 102 \(1977\)](#) (“The Act and regulations thus create an orderly administrative mechanism, with district court review of the final decision of the [Commissioner].”).

This court then ordered plaintiff to respond to the motion to dismiss. Filing No. [28](#). Plaintiff has now done so. Filing No. [29](#). However, plaintiff’s response merely states that he “timely appealed any and all each and every decision even if respondent did not recognize this ‘scribes’ scribblings! Perusal of entire file will show.” Filing No. [29](#).

The court agrees with the defendant in this case. Plaintiff has not submitted any evidence that he appealed or attempted to appeal the initial finding in 2007 of no disability. Plaintiff failed to follow the proper procedure for exhausting his administrative remedies. The court finds plaintiff failed to appeal his 2007 determination and, thus, this court does not have jurisdiction to hear this case under 42 U.S.C. § 405(g).

THEREFORE, IT IS ORDERED that defendant’s motion to dismiss, Filing No. [21](#), is granted. This case is dismissed and a separate judgment will be entered in accordance with this Memorandum and Order.

DATED this 18th day of April, 2009.

BY THE COURT:

s/ Joseph F. Bataillon
Chief United States District Judge

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